

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 481 of 2002****For Approval and Signature:****HONOURABLE MR.JUSTICE J.M.PANCHAL****AND****HONOURABLE MR.JUSTICE H.B.ANTANI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment?
 - 2 To be referred to the Reporter or not?
 - 3 Whether their Lordships wish to see the fair copy of the judgment?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
 - 5 Whether it is to be circulated to the Civil Judge?
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NADIM SALIM SHAIKH - Appellant
Versus
STATE OF GUJARAT - Opponent

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Appearance :

THROUGH JAIL for the Appellant.

MR DEEPAK M SHAH for the Appellant.

MR ND GOHIL, ADDITIONAL PUBLIC PROSECUTOR for the Opponent.

CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 13/09/2005**ORAL JUDGMENT****(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)**

1. Instant appeal filed, under Section 364 (2) of the Code of Criminal Procedure, 1973, questions legality of

judgment dated April 20, 1999, rendered by the learned Additional City Sessions Judge, Court No. 15, Ahmedabad City in Sessions Case No. 201 of 1998, by which the appellant is convicted under Section 21 of the narcotic drugs and Psychotropic Substances Act, 1985 (*"the Act"*, for short) and sentenced to RI for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default RI for 1 year.

2. The facts emerging from the record of the case are as under:

In or about April 1998, Mr. B. A. Tiwari was discharging duties as In-charge Police Inspector of Ahmedabad Railway Police Station. On April 21, 1998 at about 14.20 P.M., he was informed by Head Police Constable Mr. JogenderSingh Digpalsinh that he (JogenderSingh) had received secret information that a person, wearing full sleeve shirt, having white and blue stripes and olive green coloured pant, was selling narcotic substance near a place known as *"Kalushah Bava Pir Darga"*, which is located near the office of Chief Area Manager of Ahmedabad Railway Station. On receipt of information, Mr. Tiwari reduced the same into writing by

making an entry in the Station Diary maintained at the Ahmedabad Railway Police Station. Thereafter, he summoned *panch-witnesses* and also asked a Police Constable to requisition services of a person, who could weigh the offending substance, if found. PI Mr. Tiwari made preparation for a raid and collected necessary material, such as, plastic-bag, sealing wax, seal, pieces of cloth, twine, etc. On arrival of the *panch-witnesses*, PI Mr. Tiwari interrogated them and as they expressed their willingness to act as *panchas*, preliminary *panchnama* was drawn at the Police Station itself. The members of the raiding party, thereafter, went from the Police Station located on Platform No. 1 of the Ahmedabad Railway Station towards the office of Chief Area Manager and reached the *Darga*, mention of which was made in the secret information. On reaching the *Darga*, Mr. Tiwari and other members of the raiding party found a person, answering the description given in the secret information. PI Mr. Tiwari went near the said person and introduced himself to the said person. PI Mr. Tiwari informed the said person that an information was received that he was dealing in brown sugar and, therefore, it was necessary to search the plastic-bag carried by him. On interrogation, the person disclosed his name to be Nadim

Salim Shaikh (the appellant). Before effecting search of plastic-bag carried by the appellant, PI Mr. Tiwari offered the appellant to search plastic-bag in presence of a Gazetted Officer or a Magistrate, if so desired. However, the said offer was declined by the appellant. PI Mr. Tiwari, therefore, searched plastic-bag carried by the appellant in his hand. The search of plastic-bag resulted into find of small packets. On opening the packets, it was found that each packet was containing brown coloured powder, which was *prima facie* ascertained to be brown sugar. Mr. Tiwari demanded pass or permit from the appellant, authorising him to possess brown sugar, but no pass or permit, authorising him to possess brown sugar could be produced by the appellant. The substance, which was placed in different packets, was collected in a small plastic-bag. The substance found with plastic-bag was weighed by Soni Dineshbhai Maneklal. Its weight was found to be 3.9808 Gms. with plastic bag. The plastic bag was tied with twine. The said plastic-bag was, thereafter, placed into another plastic-bag, which was heat-sealed. The heat-sealed plastic-bag was placed in a tin, in which writing to the effect, "Babul 135" in English and Hindi language was inscribed. The tin box was, thereafter, placed in a cotton bag, which

was tied with twine. On the cotton bag, slip bearing signature of *panch-witnesses* and PI Mr. Tiwari was affixed. On the slip, seal bearing impression of "*Inspector WR Police Station AHD*" was applied. After sealing procedure was over, second part of the *panchnama* was drawn on the spot. As the appellant had committed offence punishable under the provisions of the Act, PI Mr. Tiwari lodged his complaint. He handed-over his complaint, *panchnama*, *muddamal*, accused, etc. to Head Constable Galabhai Akhambhai. Head Constable Galabhai Akhambhai handed-over *muddamal* for safe custody to Head Constable Visnubhai Ramchandra. Head Constable Vishnubhai Ramchandra gave the *muddamal* to Police Constable Karansinh Udeysinh with instructions to hand-over the same to Forensic Science Laboratory (FSL) for analysis. The complaint lodged by PI Mr. Tiwari was investigated by PSI Mr. Vasantrao Ramchandra. The Investigating Officer recorded statements of those persons, who were found to be conversant with the facts of the case. He also obtained necessary report from FSL which indicated that the substance analysed was Heroin. On completion of investigation, the appellant was charge-sheeted in City Sessions Court, Ahmedabad for commission of offence punishable under Section 21 of the Act. On

the basis of charge-sheet submitted by the Investigating Agency, Sessions Case No. 201 of 198 was registered.

3. The learned Additional City Sessions Judge, to whom the case was made over for trial, framed necessary charge against the appellant at Exh. 1. It was read-over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) PI Mr. Balkeshwarprasad Awadbihar Tiwari as PW 1, at Exh. 8; (2) *panch* Abdulhamid Abdulgaffar as PW 2, at Exh. 15; (3) Dineshbhai Maneklal Soni as PW 3, at Exh. 16; (4) Head Police Constable JogenderSingh Digpalsinh as PW 4, at Exh. 17; (5) Head Constable Galabhai Akhambhai as PW 5, at Exh. 18; (6) Head Constable Vishnubhai Ramchandra as PW 6, at Exh. 21; (7) Police Constable Karansinh Udeysinh as PW 7, at Exh. 24; (8) Investigating Officer PSI Mr. Vasantrao Ramchandra as PW 8, at Exh. 26; and, (9) Barnishi Police Constable Mr. Kadidas Himmatsinh Rathwa as PW 9, at Exh. 30, to prove its case against the appellant. The prosecution also produced documentary evidence, such as, complaint lodged by PI Mr. Tiwari, at Exh. 9; *panchnama*, indicating search of plastic-bag carried by the appellant and find of small packets containing brown sugar, at Exh. 10; arrest memo

served on the appellant, at Exh. 11; forwarding letter dated April 21, 1998 by PI to in-charge of Railway Police Station, with which complaint, panchnama, *muddamal*, etc. were handed-over, at Exh. 12; intimation that offending substance was found from the appellant, at Exh. 13; entry from register indicating that information received was reduced into writing, at Exh. 14; necessary extract from Police Station Diary, at Exh. 19; report of analysis, at Exh. 28; etc, in support of its case against the appellant.

4. After recording of evidence of the prosecution witnesses was over, the learned Judge explained to the appellant circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement, as required by Section 313 of the Code of Criminal Procedure, 1973 (for short, "*the Code*"). In his further statement, the appellant claimed that an altercation had taken place between him and the police with reference to incident of occupying seats in a train, as a result of which, the personnel of Police Station had conspired together and lodged a false case against the appellant, but he was innocent. It was further mentioned by him that in lodging false case, Police Constable

Jogindersinh had played a major role. However, he did not lead any defence evidence.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved beyond reasonable doubt that the appellant was found in possession of narcotic substance i.e. brown sugar on April 21, 1998. The learned Judge noticed that mandatory provisions of the Act were fully complied with by Mr. Tiwari. According to the learned Judge, *muddamal* was not only properly sealed, but was kept in safe custody and the same was delivered intact to FSL to enable the expert of FSL to analyse the same. After referring to FSL report, the learned Judge deduced that the appellant was found in possession of brown sugar, which is a narcotic drug. On scrutiny of evidence, the learned Judge noticed that no pass or permit was produced by the appellant, authorising him to possess brown sugar and, therefore, commission of offence punishable under Section 21 of the Act was established. In view of abovereferred to conclusions, the learned Judge has convicted the appellant under Section 21 of the Act and imposed sentence referred to earlier by judgment dated April 20, 1999, giving rise to instant appeal.

6. Mr. D. M. Shah, learned Counsel for the appellant, pointed out that mandatory provisions of Section 50 and Section 42 of the Act were not complied with at the time of search of plastic-bag carried by the appellant and, therefore, the impugned judgment should be set aside. According to him, no reliable evidence is adduced to establish that the appellant was found in possession of brown sugar and, therefore, the prosecution case should have been disbelieved by the learned Judge of the Trial Court. What was maintained before the Court was that the evidence on record is completely misappreciated by the learned Judge of the Trial Court and, therefore, the appeal should be accepted. In the alternative, it was argued that the net weight of substance found was 3.5543 Gms., which is a small quantity within the meaning of Section 27 of the Act, and, therefore, after raising inference, which is fortified from the facts of the case that the small quantity was meant for personal consumption of the appellant, the sentence imposed on the appellant should be suitably reduced.

Mr. N. D. Gohil, learned Counsel of the State Government, contended that the person of the appellant

was not searched, but plastic-bag carried by him was searched and, therefore, Section 50 of the Act would not be applicable to the facts of the case. In the alternative, it was argued that the testimony of PI Mr. Tiwari, which gets complete corroboration from contemporary document, namely, *panchnama* as well as testimony of *panch* Abdulhamid Abdulgaffar, recorded at Exh. 15, establishes that before effecting search of plastic-bag carried by the appellant, an offer was made to search the same in presence of a Gazetted Officer or a Magistrate, but the said offer was declined by the appellant and, therefore, it is wrong to contend that provisions of Section 50 of the Act were not complied with by PI Mr. Tiwari. It was emphasised that brown sugar was neither kept nor concealed in any building, conveyance or enclosed place and, therefore, provisions of Section 42 of the Act would also not apply to the facts of the case. It was argued that the evidence on record, which has inspired confidence of the Trial Court, clinchingly establishes that the appellant was found in possession of brown sugar without pass or permit and, therefore, conviction of the appellant under Section 21 of the Act should not be regarded as illegal. According to the learned Additional Public Prosecutor, it was not

claimed by the appellant, in his statement under Section 313 of the Code, that the quantity found from his possession was small quantity and was meant for his personal consumption, and as he has failed to discharge the burden of proof cast on him by sub-section 2 of Section 27 of the Act, the sentence imposed on him should not be reduced on the ground that small quantity found from possession of the appellant was meant for his personal consumption. The learned Counsel of the State Government asserted that cogent and convincing reasons have been assigned by the learned Judge of the Trial Court for convicting the appellant under Section 21 of the Act, and as the learned Counsel of the appellant has failed to dislodge those weighty reasons, the appeal, which lacks merits, should be dismissed.

7. This Court has heard Mr. D. M. Shah, learned Counsel of the appellant and Mr. N. D. Gohil, learned Counsel of the State Government at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case.

8. The fact that the appellant was found in possession of brown sugar on April 21, 1998 without pass or permit stands amply proved through the testimony of PI Mr. Tiwari, which is recorded at Exh. 8. After referring to the information, which was conveyed to him by Police Constable Jogindersinh Digpalsinh, PI Mr. Tiwari has narrated in detail the steps taken by him for the purpose of carrying out the raid. According to PI Mr. Tiwari, the members of the raiding party had reached *Darga* and searched the plastic-bag carried by the appellant, which had in turn, resulted into find of small packets containing brown sugar. PI Mr. Tiwari stands completely corroborated by contemporary document, namely, *panchnama* produced on the record of the case at Exh. 10. Though it was claimed by the appellant, in his further statement under Section 313 of the Code, that a false case was lodged against him at the instance of Head Constable Jogindersinh Digpalsinh, this Court finds that no such suggestion was made to witness Jogindersinh at all, whose testimony is recorded at Exh. 17. No good reason could be pointed out by the appellant as to why PI Mr. Balkeshwarprasad Awadbihar Tiwari and others would concoct a false case against the appellant and falsely implicate him in a serious case. As such, the record

indicates that till the receipt of information neither Mr. Tiwari nor Head Constable Mr. Jogindersinh were knowing the appellant. If the appellant had been known to any of them, his name would have been mentioned in the information received itself. But, the information, which was reduced into writing and produced at Exh. 14, makes it very evident that name of the appellant was not known to any of the members of the raiding party. Therefore, false implication of the appellant stands completely ruled out. The finding recorded by the learned Judge of the Trial Court, who had advantage of observing demeanour of the witnesses, that the appellant was found in possession of brown sugar without pass or permit, is found to be eminently just and is hereby upheld.

The plea that mandatory provisions of Section 50 of the Act were not complied with by PI Mr. Tiwari before effecting search of plastic-bag carried by the appellant and, therefore, the appellant should be acquitted, is devoid of merits. In **State of H. P. Vs. Pawan Kumar, (2005) 4 SCC 350**, the Supreme Court has authoritatively ruled that a bag or a brief-case or any such article can, under no circumstances, be treated as body of human being. What is explained therein is that they are given

separate names and are identifiable as such. According to the Supreme Court, they cannot even remotely be treated to be part of the body of a human being. The Supreme Court has further explained that depending upon the physical capacity of a person, he may carry any number of items like a bag, a suitcase, a tin box, a *thaila*, a *jhola*, a *gathri*, a holdall, a carton, etc. of varying size, dimension or weight. What is authoritatively ruled is that while carrying or moving along with them, some extra effort or energy would be required and they would have to be carried either by hand or hung on the shoulder or back or placed on the head, and in common parlance, it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc., and, therefore, it is not possible to include these articles within the ambit of the word "person", occurring in Section 50 of the Act. In view of abovequoted principle of law propounded by the Supreme Court, the plastic-bag, which was carried by the appellant, cannot be considered a part of his person. Therefore, Section 50 of the Act would not be applicable to the facts of the instant case and it was not necessary for PI Mr. Tiwari to comply with the same. Even if it is assumed, for the

sake of argument, that Section 50 was attracted to the facts of the case, this Court finds that Section 50 was fully complied with by PI Mr. Tiwari before effecting search of plastic-bag, which was carried by the appellant in his hands. PI Mr. Tiwari, in his substantive evidence before the Court, has stated that before effecting search of plastic-bag, he had offered to search the plastic-bag in presence of a Gazetted Officer or a Magistrate, but the said offer was declined by the appellant. Though PI Mr. Tiwari is cross-examined at length, nothing could be elicited during his cross-examination, which would raise doubt about his assertion that he had complied with the provisions of Section 50 of the Act. PI Mr. Tiwari stands fully corroborated by contents of contemporary document, namely, *panchnama* produced on the record of the case at Exh. 10, wherein it is mentioned that offer contemplated by Section 50 was made by PI Mr. Tiwari before effecting search of plastic-bag and that the said offer was declined by the appellant. PI Mr. Tiwari further stands corroborated by testimony of *panch* Abdulhamid Abdulgaffar recorded at Exh. 15. The *panch-witness* has in terms maintained before the Court that an offer was made by PI Mr. Tiwari to search the bag in presence of a Magistrate or a Gazetted Officer, but the

said offer was not accepted by the appellant. PI Mr. Tiwari and *panch* Abdulhamid Abdulgaffar also stand corroborated by testimony of Head Constable Jogindersinh recorded at Exh. 17. Head Constable Jogindersinh has also maintained in his testimony before the Court that PI Mr. Tiwari had offered to search the plastic-bag in presence of a Magistrate or a Gazetted Officer, but the appellant had shown his willingness for search of plastic-bag by PI Mr. Tiwari himself. Discussion of above evidence makes it very clear that provisions of Section 50 were complied with by PI Mr. Tiwari before effecting search of plastic-bag carried by the appellant. Therefore, even if it is assumed, for the sake of argument, that Section 50 of the Act is applicable to the facts of the present case, this Court is of the firm opinion that Section 50 of the Act was fully complied with by PI Mr. Tiwari and the appellant is not entitled to any benefit on the ground that mandatory provisions of Section 50 were not complied with.

As far as compliance of Section 42 of the Act is concerned, this Court finds that brown sugar was not kept or concealed in conveyance, building or enclosed place within the meaning of Section 42 of the Act and,

therefore, the question of compliance of Section 42 of the Act would not arise at all. This is so in view of catena of decisions of the Supreme Court on the point, including decisions in: (1) **Rajendra and Another Vs. State of M. P., (2004) 1 SCC 432**; (2) **Krishna Kanwar (Smt.) alias Thakuraeen Vs. State of Rajasthan, (2004) 2 SCC 608**; and, (3) **State of Haryana Vs. Jarnail Singh and Others, (2004) 5 SCC 188**.

9. This brings the Court to consider the question whether any case is made out by the learned Counsel of the appellant for reduction of sentence imposed on the appellant on the ground that the small quantity found from his possession was meant for his personal consumption. It is relevant to notice that this plea was never raised by the appellant before the Trial Court and is raised for the first time in appeal for consideration of this Court. It could not be satisfactorily established by the learned Counsel of the appellant that the quantity found from possession of the appellant was small quantity within the meaning of notification, which was issued in the year 1996 under Section 27 of the Act. Even if it is assumed, for the sake of argument, that the quantity seized was small quantity within the meaning of

Section 27 of the Act, the question which requires to be gone into is whether the said quantity was meant for personal consumption of the appellant. Whether a particular quantity is meant for personal consumption or not is essentially a question of fact and normally, in a criminal matter, inference regarding a fact cannot be raised unless permitted by law. Section 27 (2) of the Act clearly provides that where a person is shown to have been in possession of small quantity of narcotic drug or psychotropic substance, the burden of proving that it was intended for personal consumption of such person and not for sale or distribution, shall lie on such person. Therefore, there is no manner of doubt that burden of proof that so-called small quantity found from his possession was intended for his personal consumption was on the appellant. This burden of proof was never sought to be discharged by the appellant. What was claimed by the appellant, in his further statement under Section 313 of the Code, was that because of some dispute, which had taken place regarding occupation of certain seats in train, a false case was lodged at the instance of Head Police Constable Mr. Jogindersinh. However, it was never claimed by him in his statement that the quantity found from his possession was intended for his personal

consumption. In **Karim Hussain Sohra Sindhi Vs. State of Gujarat, (2003) 10 SCC 49**, small quantity of brown sugar i.e. 2.200 Gms. was seized from the appellant. A plea was raised by him that the quantity seized was meant for his personal consumption. After noticing the provisions of Section 27 of the Act, the Supreme Court has held that the accused must show that the seized goods had been kept for his personal consumption and not for sale. The Supreme Court found that though the quantity seized was small, the same was packed in 59 separate packets, which in turn, indicated that it was kept for sale. Therefore, the Supreme Court held that Section 27 was not applicable at all. Again, in **Basheer alias N. P. Basheer Vs. State of Kerala, (2004) 5 SCC 659**, the appellant claimed benefit under Section 27 of the Act, as brown sugar in small quantity i.e. 1.2 Gm. was found from his possession. It was found that narcotic substance was kept in six small packets and that the appellant was waiting for his customers. In the said case, the appellant had completely denied possession of narcotic drug and no specific plea as to personal use was raised by him when he was questioned under Section 313 of the Code. Therefore, benefit of Section 27 was denied to him. Applying the principles laid down in abovereferredto

decisions to the facts of this case, this Court finds that possession of brown sugar by him was denied by the appellant. It was never claimed by the appellant that quantity seized was meant for his personal consumption. Therefore, even if it is assumed, for the sake of argument, that the appellant was in possession of small quantity of narcotic drug, this Court is of the opinion that the appellant has failed to discharge statutory burden cast on him by Section 27 (2) of the Act and, therefore, is not entitled to benefit of the same. On the facts and in the circumstances of the case, this Court is of the view that no ground is made out by the learned Counsel of the appellant for reduction of sentence imposed on the appellant on the specious plea that small quantity of brown sugar was intended for personal consumption of the appellant.

10. Aboverefereedto are the only points which were raised for the consideration of the Court. Except these points, which have been dealt with, no other point is urged by the learned Counsel of the appellant in support of the appeal. As the Court does not find any substance in any of the contentions raised by the learned Counsel of the appellant, the appeal is liable to be dismissed.

11. For the foregoing reasons, the appeal fails and is dismissed. *Muddamal* be disposed of in terms of direction given by the learned Judge in the impugned judgment.

[J. M. PANCHAL, J.]

[H. B. ANTANI, J.]

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